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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 19.

LEKTOPHONE CORPORATION,
Petitioner,

vs.

THE ROLA COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER.

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1. *Infringement.*

Controverting our assertion that the only difference between respondent's device and the device of the patent is the substitution of a narrower rim of more flexible material, respondent's counsel assert (Brief, p. 8) that—

> "* * * at its base 'the effective area' [meaning the conical portion] of defendant's tympanum is of very much less diameter than that specified as essential in the patent,"

and they contrast (p. 9) the "relatively large, conical diaphragm" of the Hopkins patent, with the "relatively small, paper cone" of defendant's device.

But the fact is that the basal diameter of defendant's cone is 7-9/16 inches, which is larger than the 7.2 inches (eight-tenths of nine inches) of the Hopkins specification.

We regret that respondent's counsel continue to refuse to face this fact, as to which they succeeded in leading the Ninth Circuit Court of Appeals into error (see our main brief, p. 67).

It is apparent from mere inspection of respondent's loudspeaker that the designer of it has taken a large light stiff paper cone of the size recommended in the Hopkins patent, and has supported it from a rigid frame by an interposed flexible rim. He has departed from the structural embodiment disclosed by Hopkins only in substituting for the wider rim of less flexible material a narrower rim of more flexible material. No other difference exists.

We reiterate our position that this compensated change of rim is a mere colorable departure from the disclosure of the patent and does not avoid infringement (See our main brief, pp. 18-21, 56, 61 and 64).

It seems to us that discussion of the merits of the controversy is not advanced by respondent's counsel when they substitute for this reality a man of straw misrepresenting the size of respondent's cone in relation to the size of cone of the Hopkins disclosure (brief, p. 9); and misinterpreting the word "tympanum" used in the claims to include cone and rim, to exclude the rim of defendant's structure (See our brief in the *Miller case*, pp. 22-23).

It seems to us additionally unfortunate that counsel should add confusion to a very simple situation by referring (Summary of Argument, brief, p. 12) to the disclosure of the patent as—

> "a tympanum, the vibratile portion of which is less than nine inches at it base."

The words "at its base" can be applied only to the conical portion of the tympanum, whereas the nine-inch diameter discussed in the patent is the diameter of the cone plus the rim.

Again counsel say (Brief, p. 71):

> "Hopkins did not teach anything other than that the diameter of the whole tympanum between the so-called 'ponderous rings' should exceed nine inches; and any effort to show that a cone having a basal diameter of 7.2 inches comes within the teachings of the Hopkins patents, irrespective of the size and character of the rim, cannot be justified under any reasonable interpretation."

But Hopkins additionally taught what the size of **conical portion** of his direct-acting loudspeaker should be, when he said the conical portion should exceed in area one-half the total area nine inches in diameter within the surrounding annular frame. Even the Ninth Circuit Court of Appeals, in its opinion in the instant case, said, when it was comparing the size of Hopkins' cone with the size of the Starling & Cole cone, that Hopkins disclosed as a minimum a cone "whose base was 7.2 inches (eight-tenths of nine inches)" (Pamphlet, p. 87).

2. *Validity.*

Respondent's counsel summarize their attack upon the validity of the patent in the following words (Brief, p. 30):

> "How then did it involve invention to merely increase the size of the conical diaphragms with the flexible annular rims of the telephone and sound box art to the size which the other patents and publications had taught was necessary for a diaphragm which was to be used in connection with a phono-

graph in free and unconfined air. It will be borne in mind that the device of the patent in suit was designed for use with a phonograph."

That attack upon the validity of the patent was first decided in favor of the patent by the Patent Office. The examiner at one time rejected Hopkins' claims on that combination of references (See second office action, dated Feb. 7, 1914, A. F. W., 9-10). In reply to that rejection, the applicant said (A. F. W., 14):

"We respectfully solicit a careful consideration of the new claims 11 to 16, inclusive, which have been redrawn, following somewhat the form of new claims 1 and 2, to define a tympanum of such area as to produce directly regenerated sound waves substantially corresponding in intensity or amplitude to the recorded sound waves. That is to say, a tympanum adapted to regenerate by its own movements when vibrated by the record, the original sounds, without the interposition of any horn or other confining transformer. The Examiner will recognize, we believe, that such a tympanum has long been sought for by those most skilled in the art, and this is evidenced by the patents cited, such as Shanks, Amet and Lumiere."

And (A. F. W., 15):

"In our opinion the suggestion that there is no invention in the form of regenerating tympanum devised by the applicant, is entirely refuted by the Lumiere patent. If the small reproducer diaphragms of conical shape were in themselves sufficient to show those skilled in the art that the difficulties encountered by Lumiere could be overcome by adopting the form of tympanum adopted by the applicant,

then Lumiere would have adopted that form. The fact is that the applicant has succeeded where others, and those most skilled in the art, have failed, and under those circumstances deductions which might otherwise be drawn from the earlier different, but now suggestive, patented structures, are overcome by the historical fact."

And (A. F. W., 19):

"We hardly know what we can say in regard to that paragraph of the Examiner's letter which suggests that the applicant's accomplishment does not involve invention. As we understand it, the argument is that Lumiere proposed to use a large diaphragm, but not a conical diaphragm; that small conical diaphragms are old in sound boxes, and that consequently there is no invention in using a large conical diaphragm. It seems to us that this proposition need only be stated to refute itself."

And (A. F. W., 20):

"On the question of invention the Lumiere patent is pertinent to the present discussion only because it shows that prior to the applicant, the art did not know how to accomplish the applicant's result."

Thereupon the examiner withdrew this ground of rejection and acknowledged the patentability of Hopkins' invention over this combination of references.

The same defense has been rejected by every tribunal in this country and abroad that has passed upon the validity of Hopkins' patents.* Campbell, D. J., in the

*Even Judge Bodine did not rely on that defense but held that the Lumiere patents alone constitute a complete anticipation (Pamphlet, p. 49). This was reversed by the Third Circuit Court of Appeals.

Sylo case, rejected it with the remark quoted at pages 30-31 of our main brief. Thacher, D. J., in the *Western Electric case,* rejected it after full discussion quoted on pages 31-33 of our main brief. The Third Circuit Court of Appeals in the *Brandes case* rejected it, discussing the Lumiere patent in the words quoted at pages 27-29 of our main brief, and saying of the sound box and horn combination patents (Pamphlet, p. 57):

> "So also is he visited with notice as to the metallic sounding diaphragm used in confined space but these threw no light upon Hopkins' problem."

Galston, D. J., in the *Colonial case,* rejected it in full discussion found at pages 123-124 of the Pamphlet. The judgment of the Civil Tribunal of the Seine, in the *Chanoit case,* rejected it in the discussion found at pages 152-155 of the Pamphlet. This decision was affirmed by the Court of Appeals of Paris which said (Pamphlet, p. 167):

> "Gaumont patented an apparatus which comprises a diaphragm acting in a confined space and communicating with a horn. His innovation consists in the fact that the diaphragm has a conical form, but no comparison can be made between this machine and the Davis patent which entirely excludes the use of a diaphragm acting in confined space, and of a horn."

The Civil Tribunal of the Seine again rejected it in the *Radio Electrique case,* in a discussion found at page 177 of the Pamphlet, and this decision was affirmed by the Court of Appeals of Paris, which said (Pamphlet, p. 189):

> "That the earlier publications offered in opposition by the Societe Radio-Electrique are based on

entirely different conceptions; that the Ader apparatus consists of a parchment membrane stretched over a drum case; that Maxwell's is composed of a cone and a truncated cone with their bases opposite each other and supported by a wooden frame vibrating inside a box filled with fibrous material; that Brown has patented a confined diaphragm apparatus of conical form and Lumiere an apparatus comprising one or several elements, each constituted by a flat sheet of an elastic material twisted on itself."

The Chancery Division of the High Court of Justice at London rejected it in a discussion found at pages 206-209 of the Pamphlet, from which we extract the following:

"Was there a sufficient inventive step in passing from Stroh to Hopkins? To answer this question it is necessary to project the mind back so that it may assume the outlook of the inventor, having regard to the state of knowledge at the date of the patent in suit. I think that at that time to remove the sound box from a diaphragm of the Stroh type and to enlarge the diaphragm so as to give it a diameter of at least 9 inches was a sufficient inventive step to support Claim 1 of the patent in suit. It seems to me to be impossible to say that in the then state of knowledge it was obvious what the result of these changes would be."

And the German Court rejected it in the discussion at pages 243-246 of the Pamphlet, terminating with the following:

"All the prior publications discussed up to now deal in no way with large-surface diaphragms and are therefore eliminated for this reason. Nor can

it be conceded to the plaintiffs that a disclosure intended for the small diaphragm in sound boxes could be transferred directly to large diaphragms operating on unconfined ambiant air. Previously, the development has always been towards strengthening the small diaphragm by a horn effect; no one has ever struck the idea of using instead hornless large diaphragms. For this reason all prior publications discussed up to now must be immediately eliminated."

3. *How Hopkins' Acoustic Device Got Into the Radio Art.*

Respondent's counsel say (p. 5 and pp. 77-78) that "the device of the patent made no impress on the phonograph art," and suggest that the paper cone loudspeakers for use with radio receivers were developed quite independently of Hopkins' work, and that it was only after this independent development that it "occurred to the patentee or his attorneys that this Hopkins phonograph patent could be used to cover such radio cone loudspeakers" (p. 5); and that "whatever recognition was given to it was by reason of its 'nuisance value'" (p. 78).

The truth of the matter is that the **acoustic device of Hopkins' invention was first introduced into radio loudspeakers** by Mr. Farrand* in 1921, **as a direct result of his observation of its performance in a phonograph which was then being marketed by Hopkins' licensee, Pathe Freres Phonograph Company and Mr. Farrand, recognizing that he had no right to use this acoustic device in a radio loudspeaker without license from the patentee,**

*Mr. Farrand has since become "an officer of the plaintiff corporation and one of its expert witnesses in this case" (Respondent's Brief, p. 5), but at that time he was not connected with Lektophone Corporation (Tr., 83).

proceeded to negotiate for and acquire such a license. Mr. Farrand said (Tr., 82-83):

> "The circumstances under which I began the manufacture of the Phonetron were as follows:
>
> I was interested in developing a wireless telephone system which requires a loudspeaker. I heard of the development and manufacture of the phonograph called the Actuelle, by the Pathe Phonograph Company, and sought to use that as a loudspeaker. I tried other types of diaphragms, and pleated paper diaphragms. The use of a diaphragm without a horn particularly appealed to me, because loudspeakers had what were called 'horny' sound, and reverberations that were objectionable, and I thought that the cone diaphragm, working directly on the air, without the use of the horn, would probably give more faithful reproduction. * * *
>
> The loudspeakers that were on the market at that time were sound-box and horn loudspeakers.
>
> * * * * * * *
>
> As to what I found with respect to the possibility of getting a license for a radio loudspeaker—I found that the Pathe Phonograph Company had an exclusive license, and I found that there were indications that I could get a license to manufacture the product if I conducted negotiations with the Lektophone Corporation and were given a license limited to the radio field."

In view of this evidence, the use of Hopkins' acoustic device in radio loudspeakers ought not to be described as "entirely fortuitous" (Respondent's brief, p. 9).

Nor do we think counsel ought to say that "no device corresponding even remotely to Hopkins' disclosure has

ever been manufactured commercially" (p. 34) and "Hopkins' device was never built, except experimentally" (p. 54), merely because your petitioner Lektophone Corporation is not a manufacturer; when the evidence is that up to the date of the trial its licensees had manufactured and sold approximately 1,250,000 of the patented loudspeakers (Tr., 86) for phonographs (Tr., 82) and radio receivers (Tr., 83-85).

When counsel say that these licensed devices do not "correspond even remotely to Hopkins' disclosure," they prejudge the issue; and certainly against what must have been the opinion of those who paid royalty.

4. *Respondent's Contention That Claims 4 and 8 Are Void for Indefiniteness and As Claims for a Result; and Counsel's Misinterpretation of This Court's Decisions in the* Minerals Separation Cases.

It does not seem to us that there is anything vague or indefinite about these claims. They certainly define a structure, not a result. They define the invention as a three-element mechanical combination, freely exposed to unconfined air, and of such size as to directly recreate sound waves on the surrounding free air, that is, without the interposition of a sound-box and horn. **This is the essence of the Hopkins invention.**

Claim 4 says that the base of the conical portion shall exceed in area one-half the effective area of the tympanum, and that the tympanum shall be of sufficient area to impart to the surrounding free air when vibrated sound waves substantially corresponding in intensity to the original sound waves. Claim 8 says that the conical portion itself shall be of sufficient area to produce self-sustaining sound waves in the surrounding air when vibrated. This language was chosen by the applicant and agreed to by the examiner "to distinguish the pres-

ent machine from the ordinary machine in which the regenerator comprises a reproducer and a trumpet" (See our main brief, pp. 57-58).

If Hopkins had stopped with the mere exposing to unconfined air of the small conical diaphragms of the sound-box and horn combination patents, the sound spectrum would not have been produced in even balance. The low frequency would have been missing to such an extent as to destroy the timbre of the reproduction (Hazeltine, Tr., 100-101; Hopkins, Tr., 80; and our main brief, pp. 11-12). Hopkins found that in order to achieve without a horn the balanced reproduction of sound that a horn achieved (although with accompanying distortions), the loudspeaker acting directly on unconfined air had to be enlarged; that with the particular structural embodiment disclosed in his patent the overall dimensions had to be substantially nine inches and the active conical portion had to occupy at least half of that area.

It is our position that respondent's direct-acting loudspeaker, many times larger than the sound-box and horn diaphragm (main brief, p. 12) is plainly an engineer's embodiment of Hopkins' inventive thought; that faithful sound reproduction does in fact demand this multifold enlargement, substantially to a nine-inch overall diameter in the structural embodiment disclosed by Hopkins; that respondent's structural embodiment also demands such enlargement, as is evidenced when respondent selects a large light paper cone of the very size recommended by Hopkins (main brief, p. 56); that the disclosure of the specification as to size does not critically mark the beginning of a new result, but enlighteningly discloses the size necessary for best quality of reproduction (Miller brief, pp. 44-45); and that the language of claims 4 and 8 is appropriate to the invention and was insisted upon by applicant and allowed by the patent office so that the monopoly might not be limited by literalism, but would

unmistakably embrace substantial equivalents such as respondent has manufactured and sold (main brief, pp. 48 and 62).

It seems to us that respondent's counsel have misunderstood the decisions of this Court in the *Minerals Separation cases* when they say (Brief, p. 34):

> "These two claims [4 and 8] come precisely within the rule and condemnation applied by this Court in Minerals Separation vs. Hyde, 242 U. S., 261."

We think that, correctly understood, the decisions in the *Minerals Separation cases* support our position.

In *Minerals Separation* vs. *Hyde*, 242 U. S., 261, it had been represented in argument and proved by plaintiff's expert witnesses (see *Butte case*, 250 U. S., 350-352) that the new kind of froth formation, the result of the patented process, could not be obtained with more than a fraction of 1% of oil. This Court sustained the "fraction of 1%" claims but **held invalid the "small quantity of oil" claims because they were not "confined to the results obtained by the use of oil within the proportions often described in the testimony and in the claims of the patent as 'critical proportions' 'amounting to a fraction of 1% on the ore'"** (*Hyde case*, 242 U. S., 271). The claims were not held invalid for lack of definiteness but because the newly discovered result did not exist beyond a fraction of 1%.

In the *Butte case*, only the "fraction of 1% claims" were involved (250 U. S., 336). Defendant used an oily mixture (18% pine oil, 12% kerosene, and 70% fuel oil) in quantity 1.5% on the ore (p. 342). *Prima facie* this would not infringe (p. 342). Plaintiff contended, and defendant denied, that the kerosene and the fuel oil were inert and therefore not oils of the patent (pp. 343-344). This Court held (p. 345) that kerosene and fuel oils were oils of the patent, although less efficient than

pine oil, and after reexamining the patent disclosure and its relation to the prior art, found (a) that the "essence of the discovery" over the prior art Cattermole agglomeration process depended upon a critical reduction of the amount of oil which was said in the patent to be "a fraction of 1% on the ore" (p. 346); (b) that the claims with which the Court was there concerned were only the "fraction of 1% claims" and their express language could not be enlarged*; and (c) differentiation could not be made between efficient oils and inefficient oils about which nothing is said in the specification or in the claims (pp. 348-349). Plaintiff further attempted to differentiate between "frothing oils" and "non-frothing oils," characterizing the pine oil as a frothing oil and the kerosene and fuel oil as non-frothing oils. But the Court held that where the patent failed so to differentiate among the oils described in it, it was impossible for the Court to do so.

It was in that connection, having reference to the proposed differentiation among the oils covered by the valid "fraction of 1%" claims, that the Court used the language quoted by respondent's counsel here at page 36 of their brief, beginning—

> "To give such a construction to the patent would subordinate the clear description contained in it, * * * to an implied and vague description * * *," etc.

Although counsel assert (brief, p. 35) that the opinion of the trial Court in the *Butte case* (245 Fed., 577) "shows clearly" that defendant's mode of operation using more than 1% of oil was the mode of operation of the patent, yet the opinion in the *Butte* case shows that this Court found the evidence in that regard "far from

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*Citing *Keystone Bridge Co.* vs. *Phoenix Iron Co.*, 95 U. S., 274, 278; *White* vs. *Dunbar*, 119 U. S., 47, 52, and *Motion Picture Patents Co.* vs. *Universal Film Co.*, 243 U. S., 502, 510.

satisfying'' (p. 353), and found it ''difficult to see'' how respondent's process on the evidence as to wastefulness and inefficiency ''can be other than substantially different from that of the petitioner's'' (p. 353).

In the *Minerals Separation cases,* the evidence was that the newly discovered effect did not begin to appear until the oil was reduced to about one-half of one per cent. and did not fully display itself until oil had been reduced to one-tenth of one per cent. (250 U. S., 351-352). Hopkins' invention began when he discarded the sound-box and horn, opening up the diaphragm to unconfined air; and it achieved its full effect at an overall dimension of nine inches. In the *Hyde case,* the ''small quantity of oil'' claims were held invalid and the ''fraction of 1%'' claims were held valid, because the discovery did not begin, and therefore did not differentiate itself from Cattermole, above 1% of oil. Indeed, the evidence was that it did not display itself above one-half of 1% of oil. But this Court refused to restrict the claims to one-half of 1%, saying (250 U. S., 341):

> ''Thus was it plainly held proper for the patentees to claim a reasonable degree of variation—'within the scope of the claims'—in the amount of oil to be used in the application of their discovery in practice, and that the restricting of the amount to a fraction of one per cent. on the ore was reasonable and lawful.''

It is noteworthy that respondent's counsel attempt to support their limiting argument to which, as it seems to us, the decisions of this Court in the *Minerals Separation cases* are misapplied, by insisting (pp. 3-4) on the estoppel which the District Court found, but the Ninth Circuit Court of Appeals explicitly rejected (main brief, p. 6).

5. *Some Other Incorrect Assertions in Respondent's Brief.*

(a) Without reference to any supporting evidence, for there is none, respondent's counsel say (Brief, p. 50) that in respondent's device—

> "* * * the limp leather rim does not 'maintain the form and neutral position' of the cone."

The testimony of respondent's own witnesses Tenney and Jensen (Our main brief, p. 20) is to the contrary. The assertion is, in fact, essentially modified, at page 67 of respondent's brief, where counsel say—

> "It does not support the cone *stiffly* in true axial alignment, as with Hopkins, but *flexibly.*" (Emphasis ours.)

Counsel correctly say (Brief, p. 71) that we emphasize the yielding character of the support by the rim *l* in Hopkins' combination; but they incorrectly add that—

> "* * * there is no basis for this in the patent specification."

We do not think an unprejudiced reader could possibly make that statement about the Hopkins disclosure. That the support afforded by the supporting rim *l* is a flexible and yielding support seems to us inescapably evident from the structure itself. That the cone should be yieldingly supported and so capable of bodily sound-producing movement is the only reason that could be thought of for interposing the flat rim between the cone and the frame. The "intended object" is stated to be "a simultaneous movement of the whole conical portion of the tympanum" (pat., p. 2, lines 121, et seq.). In

the very first disclosure of his invention, in his parent application, Hopkins said (see our brief, p. 10):

> "The plane peripheral portion *l* * * * yields sufficiently to permit of the required motion of the conical portion * * *."

And when counsel came to urge that Hopkins' work was not inventive, they assert (Brief, pp. 30-31) that the "veriest tyro" would know that the inflexibility of the conical diaphragm must be modified by a "yielding rim" between the cone and the frame to permit "the bodily movement of the cone."

Petitioner's counsel say (Brief, p. 69)—

> "The patent contains not one word or suggestion of the use of a different or more flexible material for the rim and for the cone. * * *"

But the patent says (p. 2, lines 127, et seq.):

> "* * * it is possible to form radial or concentric corrugations in the plane peripheral portion *l*." (See our brief, pp. 13-14.)

(b) Counsel correctly say (brief, p. 68) that the assumption of equivalent mode of operation is fundamental to our argument.

But counsel say that this assumption cannot stand "in the face of the proofs of the diametrically opposed functions of the sound-deadening rim of Rola and the sound-generating rim of Hopkins." As we pointed out in our brief in the *Miller case* (pp. 17-21), this attempt to differentiate on the basis of the amount of sound produced by the supporting rims is trifling as matter of

fact (Hazeltine, Tr., 31-32; Tenney, Tr., 49-50 and 66; and Hazeltine, Tr., 93), and insignificant as matter of law. Infringement is to be determined by determining the cooperative relation to one another of the elements of the patented combination, disregarding differences which may exist in the individual characters of the two rims when studied apart from the combination only in contrast with each other. It is noteworthy that counsel make no attempt to controvert that well-established principle of law.

(c) Respondent's counsel say (p. 10) that when the Hopkins device is made of smaller size it will rattle and blast, referring to the record at pages 52-53. But it was definitely shown on rebuttal that the blasting observed in defendant's model of the Hopkins device (Ex. 17)—

> "was due to the striking of the pole pieces in the driving motor" (Hazeltine, Tr., 91).

It was another example of the frequently observed phenomenon that experts for defendant usually succeed in making the patented device so that it will not work properly.

(d) Respondent's counsel say (p. 43) that in the *Brandes case*—

> "The question of size apparently was not urged * * *."

But it was urged in precisely the same way that it is urged here (see our brief in the *Miller case*, pp. 31-32).

(e) Respondent's counsel say (Brief, p. 52):

> "If Hopkins did anything, it was to extend the crisp vibratile material of his tympanum beyond the edge of the cone in the form of a flat, annular rim, integral with the cone."

But the fact is that this had been done in the small conical diaphragms of the sound-box and horn combination patents as in Kraemer (Tr., 340-342), Edison (Tr., 345), Johnson (Tr., 392, 394) and Stroh (Tr., 428). It was not in the form or material of the rim, but in throwing away the sound-box and horn, opening up the diaphragm to unconfined air, and enlarging it until it became an effective direct-acting reproducer of sound without the assistance of a sound-box or horn, that Hopkins departed from the sound-box horn combination patents of the prior art.

(f) It is repeatedly said in respondent's brief (pp. 17-18 and 73) that the defect of blasting "could not possibly have confronted Hopkins at the time he filed his applications" when the available power was less than it is in modern radio receivers. Counsel cite no evidence to support their assertion that the lesser power available in the old days would not cause blasting of a cone unsupported at its edge. There is no evidence to that effect. Hopkins' uncontradicted testimony is to the contrary (Tr., 74).

(g) The structures of the prior art patents are not difficult to understand from inspection of the patents themselves. Argumentatively, respondent's counsel make certain statements about some of these patents that seem to us unjustified. Thus:

(1) Of the Dann & Lapp patent 338,660, respondent's counsel erroneously say (Brief, p. 18):

> "This early patent shows a conical diaphragm apparently three or four inches in diameter * * *."

But the fact is that the patentees say, as to the diameter of the base of the cone—

"we prefer it shall equal and even slightly exceed that of the contiguous inner end of the mouthpiece B, of which it forms practically a conical extension" (Tr., 471).

The diameter of the inner end of the telephone mouthpiece is about one-half inch. The device demonstrated at the trial was not "constructed in accordance with this patent," but was a Rabelaisian enlargement, having a mouthpiece suited to a Pantagruel. The Dann & Lapp patent was properly grouped by the District Court in the instant case (Pamphlet, p. 82) along with the small diaphragm sound-box and horn patents to Brown, Stroh and English.

(2) Of the Maxwell patent, counsel say (Brief, p. 20) that it disclosed a three-element combination of the Hopkins patent—

"* * * the cone being represented at B, and the rim at A. This rim in turn is fastened to the rigid member forming the housing or box-like structure."

But the fact is that the rim of Maxwell's conical vibrator (Tr., 222) is fastened directly to the flat sounding-board A so as to avoid any flexible connection between the vibrator and the sounding-board. The member A is not a "rigid member forming the housing or box-like structure," but is the sounding-board of the device, as the Ninth Circuit Court of Appeals in the instant case pointed out, saying (Pamphlet, p. 97):

"* * * the conical sheepskin diaphragm is only a part of the vibrating element, the balance being the thin board to which it is attached."

To interpose a flexible connection between Maxwell's conical vibrator and his sounding board would be to defeat his purpose, which is to impart the vibration to the sounding-board.

As Galston, D. J., said, in the *Colonial case* (Pamphlet, p. 122):

> "The sounding-board of Maxwell is certainly not the flexible rim of Hopkins."

(3) Of the Lumiere patents, counsel say (p. 21) that

> "they enjoyed considerable commercial development in the early days * * * "

and (p. 41) counsel criticize the assertion in the decision of the Third Circuit Court of Appeals—

> "that the Lumiere patents attained no position in the practical art"

saying that—

> "The record in the present case shows that some 40,000 of these Lumiere devices were actually manufactured and sold by the Victor Company."

But, as we pointed out in our brief in the Miller case (pp. 32-33), the evidence as to commercial use of the Lumiere loudspeakers was stronger in the record before the Third Circuit Court of Appeals than it is in the present record, which definitely shows that the Victor Company discontinued the manufacture and sale of these devices in the year 1926.

As for counsel's expression "in the early days," this manufacture by the Victor Company was begun in 1925, long after the Hopkins devices had come on the market. During 1925 and 1926 these devices were manufactured for sale in competition with the Hopkins devices. In 1926 their manufacture and sale was discontinued.

Respondent's counsel are wrong when they say (p. 41)—

> "The record also shows that the Lumiere device was being manufactured in France as early as 1908 or 1909."

Reference to the record at page 37 shows only that a device was sent from France to the experimental laboratory of the Victor Company; that the Victor Company then experimented with diaphragms of the Lumiere type, but did not manufacture them. If they had been manufactured in France, no doubt counsel would have proved it, and that fact also would, doubtless, have been proved in the European litigation on the Hopkins patent.

(4) With reference to the Brown British patent 29,833 of 1910, counsel attach importance (brief, p. 29) to the statement—

> "When it is desired to make the sounds travel out into the room, a receiver of larger size is preferable" (Tr., 390).

Of this remark, Thacher, D. J., in the *Western Electric case* (See our main brief, p. 31; Pamphlet, p. 29) said:

> "This is purely casual and obscure, but it is as close as anyone came to Hopkins."

And interpreting this British patent Mr. Justice Tomlin in the suit against Brown said (Pamphlet, pp. 206-207):

> "It was suggested that the inventor there meant that the diaphragm should be worked in free air without a sound-box. I do not think so. I think he meant a larger receiver was desirable when a horn or amplifying device instead of an earpiece was to be used."

Respectfully submitted,

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